

“SAVE THE LAND FROM UNCLE SAM”: USING LIFE INSURANCE PREMIUM FINANCING IN ESTATE PLANNING

*by Lee Lytton**

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“[T]he art of government consists of taking as much money as possible from one party of citizens to give to the other.” — Voltaire

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I. INTRODUCTION¹

Perpetuating the legacy of landownership requires careful estate planning by today's farmers and ranchers.² Unfortunately, the federal estate tax can be particularly destructive to these estates where there is a desire to pass on legacy holdings to succeeding generations, but the estate lacks adequate cash for the family to pay the resulting taxes.³

Common strategies in estate planning include gifting programs, family trusts, by-pass trusts, family limited partnerships, and others.⁴ While all are worthy topics, this article focuses on a specific estate planning strategy that utilizes life insurance premium financing to generate a ready cash pool to pay estate taxes and ultimately save the family farm or ranch from the taxman.⁵ While this strategy is not universally applicable, for those who qualify it can provide a cost-effective estate planning option for legacy preservation.⁶ This article is divided into separate sections that discuss: (a) the unique characteristics of agricultural landownership; (b) wealth transfer taxes with specific focus on the federal estate tax, its criticisms, and its purposes; (c) a general review of life insurance as an estate planning tool; and (d) premium financing as a means of assuring sufficient estate liquidity for agricultural legacy preservation.⁷

II. FARMS AND FAMILIES

While "saving the family farm" is a phrase familiar to many, some, usually without any farm and ranch experience, may wonder why agricultural landholding stands out as different from most other assets.⁸ Each piece of land is often described as unique and unlike any other form of

1. While this article focuses on farmers and ranchers, in most cases it is equally pertinent to succession planning for small business owners.

2. See NAT'L AGRIC. STATISTICS SERV., U.S. DEPT. AGRIC., FARMS, LAND IN FARMS, AND LIVESTOCK OPERATIONS 2008 SUMMARY 29-30 (Feb. 2009), available at <http://usda.mannlib.cornell.edu/usda/current/FarmLandIn/FarmLandIn-02-12-2009.pdf> (noting the terms "farm" and "ranch" are often used interchangeably). The United States Department of Agriculture (USDA) defines a "farm" as "any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the year [sic]". *Id.* "The definition of a farm has remained the same since 1974. Activities included as agriculture, however, have undergone modification in recent years." *Id.* at 32. Ranches are now included in the definition of farms. *Id.* at 31.

3. Stephanie A. Weber, *Re-Thinking the Estate Tax: Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 117-18 (2001).

4. Steven H. Seel, *Striking the Planning Balance—Practical Results for Sophisticated Clients*, in LEADING LAWYERS ON WORKING WITH CLIENTS, UPDATING TRADITIONAL STRATEGIES, AND RESPONDING TO RECENT LEGAL AND ECONOMIC DEVELOPMENTS 1, 10 (2008), available at 2008 WL 5689249.

5. Premium financing as used herein is sometimes referred to as "Asset Backed Insurance Lending."

6. See Seel, *supra* note 4 at 8.

7. See *infra* Parts II-V.

8. See *infra* note 11.

property.⁹ When left purely to economics, it may be hard to explain this phenomenon of “uniqueness.”¹⁰ Only by taking into account the psychological and sociological aspects of property ownership can non-landowners fully appreciate the relationship that develops between land, landowner, and succeeding generations.¹¹

The devastating effect of the federal estate tax on American farms has not escaped congressional deliberation, in part because land and agriculture represent a major segment of the American economy.¹² Yet, despite American reliance on agricultural production, estate tax is one of the principal reasons multi-generational farms and ranches are liquidated.¹³

A notable long-term trend in agriculture demographics is the continued aging of the American farmer.¹⁴ For example, 21% of U.S. farms in the 2007 census were classified as retirement farms.¹⁵ The average age of today’s farmer is 57.1 years old, representing an increase of almost two years in age from 2002.¹⁶ While access to better healthcare allows for longer lives, many of today’s aging farmers and ranchers confront the growing likelihood that their adult children will be lured from the

9. See *Centex Homes Corp. v. Boag*, 320 A.2d 194, 196 (N.J. Super. Ct. Ch. Div. 1974) (discussing the uniqueness of land as the basis for establishing specific performance as an equitable remedy in real estate transactions, and ultimately concluding that condos are more akin to personal property than real property precisely because they lack the uniqueness inherent in land).

10. See *id.*

11. See Andreas Rahmatian, *Psychological Aspects of Property and Ownership*, 29 LIVERPOOL L. REV. 287, 287-88 (2008) (discussing the academic void in existence between the legal and psychological perspectives of evaluating property ownership).

12. *The Effect of the Estate Tax on Central New Jersey Farms and Small Businesses: Hearing Before the Subcomm. on Tax, Finance, and Exports of the Comm. on Small Business H.R.*, 105th Cong. 4-20 (1998) (statements of Penny Hendrickson, Owner, The Hendrickson Farm; Tom Everett, President, Somerset County Agricultural Board; Steven Jany, Farmer; and Henry “Pete” Chamberlin, Small Farm Owner); see also BUREAU OF INTERNATIONAL INFORMATION PROGRAMS, U.S. DEPT. OF STATE, USA ECONOMY IN BRIEF 8-10 (2006), available at <http://www.america.gov/media/pdf/books/economy-in-brief.pdf#popup>. While agriculture currently constitutes less than one percent of the nation’s GDP, it continues to be a major force in the United States economy. *Id.* This is due in large part to technological advancements and efficiency measures that allow the industry to operate at such a surplusage that it generates large export revenues. *Id.*

13. See Matthew A. Tavrdes, *Planning Solutions for Families in Agriculture*, THE CODICIL, Jan. 6, 2009, http://www.thecodicil.org/home/index.php?option=com_content&view=article&id=67:planning-solutions-for-families-in-agriculture-&catid=34:articles&Itemid=56.

14. See NAT’L AGRIC. STATISTICS SERV., U.S. DEPT. AGRIC., 2007 CENSUS OF AGRICULTURE: FARMERS BY AGE 1 (Feb. 2009), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/farmer_age.pdf.

15. See News Release, U.S. Dept. Agric., Census of Agriculture Shows Growing Diversity in U.S. Farming, Feb. 4, 2009, http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentid=2009/02/0036.xml&contentidonly=true.

16. Compare NAT’L AGRIC. STATISTICS SERV., *supra* note 14, with NAT’L AGRIC. STATISTICS SERV., 2002 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA 6 (June 2004), available at <http://www.agcensus.usda.gov/Publications/2002/USVolume104.pdf> (noting the average age was 55.3 in 2002).

agricultural life to urban areas in pursuit of more lucrative salaries and a better education, leaving parents and grandparents struggling with ways to preserve the family legacy for future generations.¹⁷ This toxic combination, coupled with punitive estate taxes, helps explain the rapid loss of farm and ranch land, emphasizing anew the importance of proper succession planning even though the process is often complicated by underlying inter-family issues.¹⁸

Farmers and ranchers face additional obstacles. Few involved in agriculture as a vocation pursue advanced degrees in tax, law, or finance.¹⁹ Likewise, the estate tax has had an especially insidious effect on agricultural landowners who have not escaped its effect. However, others such as “the Vanderbilts and the Carnegies, or the more modern moguls like Bill Gates and Donald Trump . . . are the precise individuals the estate tax targets, [but] they are the ones who have the motive and means for evading the tax completely.”²⁰

The estate tax affects two groups with particular severity: farmers and small business owners.²¹ Farmers and ranchers are often “land rich, and cash poor,” having few liquid assets to pass on to future generations.²² Many undervalue their landholdings, failing to fully face the reality of appreciation over time.²³

III. WEALTH TRANSFER TAXES²⁴

There are various terms used to describe the taxes assessed when property changes hands because of, or in anticipation of, death.²⁵

17. See Ted Gudorf & David Beckett, *Farm Succession Planning: What We've Learned Since San Antonio*, THE CODICIL, Jan. 6, 2009, http://www.thecodicil.org/home/index.php?option=com_content&view=article&id=69:farm-succession-planning-what-weve-learned-since-san-antonio&catid=34:articles&Itemid=56 (noting that one San Antonio symposium was devoted entirely to “the succession crisis that is looming for farmers nationwide”).

18. See Tavriles, *supra* note 13; see also Seel, *supra* note 4, at 95 (2008).

19. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: 2010-11 EDITION, January 6, 2009, <http://www.bls.gov/oco/ocos349.htm>. Most farmers and ranchers get on-the-job training instead of pursuing college degrees. *Id.*

20. Stephanie A. Weber, *Re-Thinking the Estate Tax: Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 117 (2001).

21. *Id.* at 117-18.

22. CHRISTIAN RAMSEY, LAND RICH, CASH POOR 1 (Dog Ear 2007).

23. USDA—Census Factsheet. NAT'L AGRIC. STATISTICS SERV., U.S. DEPT. AGRIC., 2007 CENSUS OF AGRICULTURE: VALUE OF FARM LAND AND BUILDINGS 1 (Feb. 2009), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/land_values.pdf. “The average value of all land and buildings on farms in the United States increased steadily from 1987 to 2008.” *Id.*

24. This article addresses only the federal level of wealth transfer taxes. There are a number of additional state wealth transfer taxes, particularly inheritance taxes, which are not the subject of this paper as they vary state-to-state.

25. See *infra* notes 26-30 and accompanying text.

Generically, these are described as “wealth transfer taxes.”²⁶ The United States uses a three-part unified transfer tax system consisting of an estate tax, a gift tax, and a generation-skipping tax.²⁷ The focus of this article is only one of two death taxes: the estate tax.²⁸

A. Criticism of the Estate Tax

Estate taxes are widely criticized for compounding the grief of loved ones at a time of loss, for being “intrusive into the private affairs of individuals and families,” and for producing obstacles to those who would otherwise engage in the economically efficient use of resources.²⁹ However, despite criticism, estate taxes have been a part of recorded human civilization from as early as 700 B.C., and they promise to continue affecting succession planning in the future.³⁰

B. Purposes of the Estate Tax

1. Temporary Revenue

From 1789 through 1915, the United States occasionally implemented some form of death tax to generate temporary revenue to pay for short-term sporadic drains on the economy, typically caused by wars.³¹ For example, the Stamp Act of 1797 was the first of these initiatives used to finance the

26. BLACK’S LAW DICTIONARY 1499 (8th ed. 2004) (defining a *transfer tax* as “a tax imposed on the transfer of property, esp. by will, inheritance, or gift.”).

27. Patrick Fleenor, TAX FOUNDATION, A HISTORY AND OVERVIEW OF ESTATE TAXES IN THE UNITED STATES, 1 (January 1994), <http://www.taxfoundation.org/files/f7c34848582a114133f90711b50b9a3a.pdf>; see also BLACK’S LAW DICTIONARY 1499 (8th ed. 2004). Black’s Law Dictionary defines *estate tax* as “a tax imposed on the transfer of property by will or by intestate succession.” *Id.* *Gift taxes* are noted by Black’s Law Dictionary as “imposed when property is voluntarily and gratuitously transferred. Under federal law, the gift tax is imposed on the donor, but some states tax the donee.” *Id.* Lastly, Black’s Law Dictionary notes that *generation-skipping transfer tax* refers to “a gift or estate tax imposed on a generation-skipping transfer or a generation-skipping trust.” *Id.*

28. BLACK’S LAW DICTIONARY 1499 (8th ed. 2004). *Death taxes* describe both *estate* and *inheritance taxes*, as they are both triggered by a death. *Id.* However, an *inheritance tax* is distinct from an *estate tax* in that it is “imposed on a person who inherits property from another (unlike an estate tax, which is imposed on the decedent’s estate). There is no federal inheritance tax, but some states have an inheritance tax.” *Id.*

29. See Fleenor, *supra* note 27, at 3; see also, Gary Robbins, Estate Taxes: An Historical Perspective, BACKGROUNDER January 4, 2004, at 1, available at http://www.heritage.org/research/taxes/upload/54550_1.pdf (stating that the death tax is an inefficient tax on wealthy and middle class Americans).

30. JOHN R. LUCKEY, A HISTORY OF FEDERAL ESTATE, GIFT, AND GENERATION-SKIPPING TAXES, Congressional Research Service Report For Congress 95-444A, at 1 (Apr. 9, 2003), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-5392:1>.

31. *Id.* at 6.

Quasi-War naval conflicts with France.³² Congress rescinded the Act in 1802.³³ Then, with the beginning of the Civil War, Congress reinstated the tax in the Revenue Act of 1862.³⁴ Congress subsequently repealed the Act in 1870, five years after the conclusion of the Civil War.³⁵ Finally, in 1898, the Spanish-American War produced the War Revenue Act of 1898, ultimately repealed in 1902.³⁶ Following the conclusion of each event, when the necessity for additional federal funding revenue ended, each tax act was repealed.³⁷

2. *Wealth Redistribution*

While the original purpose of death taxes may have been to fund wars, wealth redistribution quickly gained popularity as a reason to maintain the estate tax.³⁸ President Theodore Roosevelt advanced this theory in a 1906 speech when he promoted

a progressive tax on all fortunes beyond a certain amount, either given in life or devised or bequested [sic] upon death to any individual—a tax so framed as to put it out of the power of the owner of one of these enormous fortunes to hand on more than a certain amount to any one individual.³⁹

Breaking with previous war related underpinnings, the Revenue Act of 1916 was adopted in response to “the enormous amounts of wealth amassed by an elite few—the Carnegies, Mellons, duPonts, Vanderbilts, and Morgans.”⁴⁰ From that time forward, Congress has ensured the assessment of some form of death tax.⁴¹

3. *Source of Federal Revenue*

It is often argued that retaining the estate tax provides a continuous source of federal revenue.⁴² While this is a commonly stated reason for

32. *Id.*

33. *Id.* at 2.

34. *Id.* at 3.

35. *Id.* at 4.

36. *Id.*

37. *Id.* at 6.

38. *Id.*

39. *Id.*

40. Stephanie A. Weber, *Re-Thinking the Estate Tax: Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 114 (2001).

41. See generally LUCKEY, *supra* note 30 (discussing an overview of the history of the federal estate tax).

42. See Fleenor, *supra* note 27, at 11.

preserving the federal estate tax, opponents and even some proponents, point out that the tax does not dramatically affect total federal revenue.⁴³ For example, following WWII, the margin of transfer tax revenue has only varied from a minimum of 0.8% in 1988 to a maximum of 2.6% in 1972.⁴⁴ Some also argue that, when coupled with the high costs of administering the tax and the added costs of hiring legal and financial advisors to avoid its effects, the federal estate tax actually operates at a revenue loss.⁴⁵

4. Recent Developments

*“The challenge for the estate attorney is the inability to give definitive counsel on future tax laws.”*⁴⁶

While it is impossible to accurately predict the future of the estate tax, as political winds shift, Congress routinely reassesses the necessity of the federal estate tax against its current level of popularity—or unpopularity.⁴⁷ In 2001, opponents of the estate tax had a momentary glimpse of hope when the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) was adopted during the Bush Administration.⁴⁸ One of the primary components of the Act was to phase-out estate taxes from 2002 through 2009, and eventually to repeal the estate tax in 2010.⁴⁹ EGTRRA’s gradual estate tax reduction is broken down by year in the following table:⁵⁰

| Year | Exclusion Amount | Tax Rate |
|------|------------------|----------|
| 2002 | \$1 million | 50% |
| 2003 | \$1 million | 49% |
| 2004 | \$1.5 million | 48% |
| 2005 | \$1.5 million | 47% |
| 2006 | \$2 million | 46% |
| 2007 | \$2 million | 45% |

43. *Id.* at 18.

44. *Id.*

45. See JOINT ECON. COMM’N, COSTS AND CONSEQUENCES OF THE FEDERAL ESTATE TAX 17 (2006), available at <http://www.house.gov/jec/publications/109/05-01-06estatetax.pdf>.

46. Matthew D. Gardner, *Client Strategies for the Estate Planning Process*, in LEADING LAWYERS ON UNDERSTANDING THE CLIENT’S GOALS, USING TRUSTS EFFECTIVELY, AND PLANNING IN A CHANGING ECONOMIC CLIMATE 1, 2 (2009), available at 2009 WL 1615244.

47. See *id.*

48. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (June 7, 2001) (referring to the Economic Growth and Tax Relief Reconciliation Act as “EGTRRA”).

49. See Economic Growth and Tax Relief Reconciliation Act §§ 501, 511; see also I.R.C. §§ 2001, 2210 (West 2003).

50. See Economic Growth and Tax Relief Reconciliation Act § 511; see also I.R.C. § 2001 (West 2003).

| | | |
|------|---------------|-----|
| 2008 | \$2 million | 45% |
| 2009 | \$3.5 million | 45% |
| 2010 | \$0 | 0% |
| 2011 | \$1 million | 55% |

As a form of political compromise, the 2010 repeal was counterbalanced by a 2011 sunset provision that resurrected the death tax to its pre-EGTRRA 2001 tax rate of a \$1 million exclusion amount and a 55% tax rate.⁵¹

However, in anticipation of the 2010 repeal, the House passed H.R. 4154 in 2009 in an attempt to permanently extend the 2009 rates through 2010 and beyond.⁵² Unfortunately, the Senate has yet to confirm the House action, and while it is likely that the Senate will soon act to make the application of 2009 rates retroactive to January 1, 2010, as of the date of this article the confirmation has not occurred.⁵³ Nonetheless, media pundits are quick to remind readers that President Obama's budget will insure a historic increase in the death tax when compared with any hopes for its ultimate repeal.⁵⁴ Until the uncertainty is finally settled by congressional action, estate planners are in the unfortunate position of having to continue advising clients without full knowledge of the ultimate outcome.⁵⁵

5. Thoughts on the Future

Sadly, only a small percentage of those really in need of estate planning services seek competent advice.⁵⁶ What was true as early as 700 B.C. in ancient Egypt is true today in modern America—that along with estate taxes comes the effort to avoid what many perceive as government-sponsored land redistribution, resulting in an impediment to legacy preservation and the orderly transfer of assets upon death.⁵⁷

51. See Economic Growth and Tax Relief Reconciliation Act § 901; see also I.R.C. § 1 (West 2008).

52. See The Permanent Estate Tax Relief for Families, Farmers, and Small Businesses Bill of 2009, H.R. 4154, 111th Cong. (2009).

53. Joseph Brownstein, *Lack of Estate Tax in 2010: Now Cheaper to Die?*, ABC NEWS, Jan. 1, 2010, <http://abcnews.go.com/Health/HealthCare/lack-estate-tax-2010-now-cheaper-die/story?id=9412614>.

54. See Editorial, *Night of the Living Death Tax: Obama's Budget Quietly Resurrects it in 2010*, WALL ST. J., Mar. 31, 2009, at A20, available at <http://online.wsj.com/article/SB123846422014872229.html>. Referring to the fact that "buried in footnote 1 on page 127 of the President's budget" is the statement, "The estate tax is maintained at its 2009 parameters" which is an enormous jump from the complete repeal. *Id.*

55. See CCH TAX BRIEFING, TREASURY RELEASES "GREEN BOOK" OF TAX PROPOSALS: SPECIAL REPORT 9 (May 14, 2009), available at <http://tax.cchgroup.com/PDFs/Tax-Brief-GreenBook-05-14-09.pdf>.

56. See Seel, *supra* note 4, at 94.

57. See LUCKEY, *supra* note 30, at 1; see also Seel, *supra* note 4, at 92-93; see also Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMPLE POL. & CIV. RTS. L. REV. 1, 2 (2007) (discussing the resultant problems of 'legal

Some additional considerations include avoiding the time, expense, and publicity of probate, and avoiding the possibility of multi-jurisdictional proceedings.⁵⁸ Moreover, unearthing a burning desire from the family patriarch or matriarch to engage in serious estate planning is often difficult given the natural human tendency to avoid facing mortality.⁵⁹ Estate planning emphasizes the value of frank inter-family discussions when practical.⁶⁰ Discussions are particularly important for agricultural landowners with highly appreciated land because it can force an honest family’s appraisal of problems and solutions, and help them to plan for potential estate taxes and other concerns that could burden succeeding generations.⁶¹ Estate planning for tax purposes is an essential component of any honest discussion, and as noted by a Joint Economic Committee Study, “[T]ax liabilities depend on the skill of the estate planner, rather than on capacity to pay.”⁶² The report continues by stating that “the estate tax affords so many avoidance and minimization opportunities that some observers have dubbed it a ‘voluntary tax.’”⁶³

IV. USING LIFE INSURANCE AS AN ESTATE PLANNING TOOL

Life insurance is often used as part of an estate plan to generate and maintain separate cash reserves to pay death taxes. As a general rule, when death benefits are paid they are not included as income to the beneficiaries.⁶⁴ However, life insurance proceeds may be included in the decedent’s estate when calculating estate tax liabilities.⁶⁵

Estate tax liability depends on the calculated value of the gross estate, and whether the value exceeds the applicable exclusion amount.⁶⁶ Life insurance proceeds are included in the value of the gross estate when either the decedent’s estate is the recipient of the life insurance proceeds, or the decedent, at the time of death, retained “incidents of ownership” in the life insurance policy.⁶⁷ In this context, incidents of ownership are not restricted

theft’ and loss of family land to developers when multiple heirs wind up in court to determine land partition, particularly in the historical context of African-Americans).

58. See Gardner, *supra* note 46, at 2.

59. See *id.* at 8.

60. See Seel, *supra* note 4, at 100 (2008).

61. See *id.*

62. JOINT ECON. COMM., 109th Cong., COSTS AND CONSEQUENCES OF THE FEDERAL ESTATE TAX, at ii (Comm. Print 2006), available at <http://www.house.gov/jec/publications/109/05-01-06estatetax.pdf>.

63. *Id.* at 13.

64. See 26 U.S.C. § 101(a)(1) (2006).

65. Joseph Karl Grant, *Irrevocable Life Insurance Trusts*, LEXISNEXIS EXPERT COMMENTARY, 1 (2008).

66. See discussion *supra* Part III.B.4 (explaining the historical estate tax rates). In 2008, it was \$2,000,000. *Id.* For 2009, it is \$3,500,000. *Id.* While the law currently states that the federal estate tax will be repealed in 2010, it is widely expected and there is active legislation to reinstitute a federal estate tax. *Id.*

67. 26 U.S.C.A. § 2042 (West 2010).

to owning insurance policies in the narrow sense, but rather the implications are more expansive.⁶⁸ For example, simply being the trustee of a trust that owns the policy, or having the right to cancel, surrender, assign, or otherwise alter the life insurance policy qualifies as an incident of ownership.⁶⁹

The Irrevocable Life Insurance Trust (ILIT) is normally used as an estate planning tool when life insurance coverage is an option.⁷⁰ However, because of the potentially disastrous consequences to the beneficiaries of an estate plan that uses life insurance as an estate tax strategy, legal and tax professionals should be well-schooled in the details of the supporting life insurance products, particularly with respect to how the cash value growth of the policy directly affects the end results of the estate plan.⁷¹

Since the key to limiting tax liability is to avoid the incidents of ownership in the life insurance policy, the ILIT must own the life insurance policy on the insured.⁷² By properly creating the ILIT, all incidents of ownership are vested in the trust, rather than the insured.⁷³ Thus, the ILIT furnishes an immediate source of cash, and if properly drafted and implemented, escapes the federal estate tax.⁷⁴ Without the ILIT safe harbor, and assuming a roughly 50% effective estate tax rate as an illustration, the tax burden to the surviving family would be assessed directly against the assets *inside* the decedent's taxable estate, thus earmarking roughly 50% of calculated estate value to the estate tax.⁷⁵

Further, the ILIT must be in place for at least three years before the death of the insured.⁷⁶ Otherwise, there is a risk that the death benefit will be added into the decedent's gross estate.⁷⁷ Additionally, it is important to consider whether premium payments will qualify as part of the annual gift tax exclusion.⁷⁸ In this context, premium financing may offer a significant benefit.⁷⁹

A. Life Insurance Products

Choosing the correct life insurance product is critical. Like the "three legged stool" that depends on all three of its legs for stability, an ideal

68. *Id.*

69. *See Grant supra* note 65, at 1.

70. *See Seel, supra* note 4, at 107.

71. *See infra* Part IV.A.

72. *See Grant, supra* note 65, at 2.

73. *Id.*

74. *Id.*

75. *See Seel, supra* note 4, at 107.

76. *See* 26 U.S.C.A. §§ 2035, 2042 (West 2010).

77. 26 U.S.C.A. § 2035.

78. *See Grant, supra* note 65, at 2.

79. *See infra* Part V.D.

wealth transfer plan for high net worth landowners similarly involves the three legs of legal, tax, and insurance for success.⁸⁰

Premium financing introduces another component to the "insurance leg" of the stool.⁸¹ There are numerous insurance product options available to the normal consumer when evaluating different policies.⁸² However, with the financing component added, the policy design must be such that the cash value of the policy will grow sufficiently over time to not only pay the principal (and usually the interest) on the loan, but also leave the death benefit intact within the ILIT.⁸³ To accomplish this end, only certain products have the necessary growth potential.⁸⁴

1. Policy Structure

Of the two primary categories of life insurance, permanent and term, a specific type of permanent life insurance—the Fixed Indexed Universal Life (FIUL) product—is the only viable option to support premium financing.⁸⁵ There are numerous variations of permanent life insurance, such as traditional whole life, traditional universal life, variable life, and variable universal life.⁸⁶ With the exception of the FIUL, none are suitable because they are unlikely to produce the increase in cash value that is necessary to make premium financing a realistic option.⁸⁷

Variable products, such as variable universal life (VUL), have additional hurdles.⁸⁸ They are not only "life insurance," but the Securities and Exchange Commission (SEC) also regulates them as "securities."⁸⁹ In a VUL, cash value performance is linked to separate mutual fund sub-accounts with true market exposure.⁹⁰ Because they are affected not only by market risk, but also by internal management fees within the mutual fund sub-accounts, there are many otherwise willing lenders that refuse to make premium financing loans that are secured by variable products.⁹¹

80. DAVID W. BELIN, *LEAVING MONEY WISELY: CREATIVE ESTATE PLANNING FOR MIDDLE-AND UPPER-INCOME AMERICANS FOR THE 1990S* 205-06 (Michael Gartner ed., Charles Scribner's Sons 1990).

81. *See infra* Part V.

82. CHARLES L. RATNER, *PLANNING TECHNIQUES FOR LARGE ESTATES: LIFE INSURANCE PLANNING AND PRODUCTS*, SP023 ALI-ABA Course of Study Materials 1, 1-4 (Nov. 2008).

83. *See infra* Part IV.A.2.

84. *See infra* Part IV.A.1 and accompanying text.

85. Matthew Tuttle, *Premium Financing: A Tool to Pay Life Insurance Premiums*, THE CPA J. (N.Y. State Soc'y of CPAs), Sept. 2007, <http://www.nysscpa.org/cpajournal/2007/907/perspectives/p15.htm> (noting that Fixed Indexed Universal Life is also referred to as equity-indexed life insurance).

86. RATNER, *supra* note 82, at 2-4.

87. Tuttle, *supra* note 85.

88. *See infra* note 91.

89. Tuttle, *supra* note 85.

90. *Id.*

91. DONALD O. JANSEN, *SPLIT DOLLAR INSURANCE AND PREMIUM FINANCING PLANNING*, SM087 ALI-ABA Course of Study Materials 247, 287 (June 7-8, 2007).

2. The Fixed Indexed Universal Life (FIUL) Policy

Because of its structure, the FIUL offers the greatest probability of growth in cash value over time to ultimately outperform the loan.⁹²

As a category of permanent life insurance, the FIUL is a universal life product characterized by premium and death benefit flexibility.⁹³ Though closely related to the VUL, the VUL's cash value is driven largely by the mutual fund securities within its sub-accounts, whereas the FIUL is an "insurance" product and no cash is invested in the market.⁹⁴ Instead, the FIUL "tracks" the market performance of one or more financial indexes, such as the S&P 500.⁹⁵ The cash account is then credited at selected intervals with a specific sum, which is based on the performance of the index within the period.⁹⁶ While crediting rates vary, they are usually subject to upper limit index growth caps.⁹⁷ Should the index perform above the cap, no account credit is applied for the growth above the cap.⁹⁸ However, most policies guarantee that if the index perform negatively within the period, the crediting rate will never go below zero.⁹⁹

3. Other Considerations

With premium financing, cash value within the FIUL is king.¹⁰⁰ Cash value can be thought of generally as money left in the policy after the premium is paid and the insurance company has deducted for itself the "cost of insurance."¹⁰¹ Cash value, as it affects premium financing, plays three critical roles within the FIUL: (1) cash value is the primary source of collateral for the loan; (2) cash value must grow over time to repay the loan, barring the death of the insured a short time after the effective date of the policy; and (3) cash value must ultimately support the death benefit which is used to pay estate taxes.¹⁰²

Thus, the strategy is for the financial institution to loan the ILIT the absolute maximum amount needed to pay the premium, so long as the

92. Tuttle, *supra* note 81.

93. RATNER, *supra* note 82, at 2-4.

94. See STEPHEN E. ROTH, THE SECURITIES STATUS OF LIFE INSURANCE COMPANY PRODUCTS, 902 PRACTICING LAW INSTITUTE COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES, 169, 176-77 (2008) (discussing the definition of insurance products as distinguished from securities).

95. STEVEN KASS, CURRENT DEVELOPMENTS IN LIFE INSURANCE AND ANNUITIES, 811 PRACTICING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES LITIGATION 265, 290-91 (2010).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. RATNER, *supra* note 82, at 2-4.

101. KASS, *supra* note 95, at 194.

102. JANSEN, *supra* note 91, at 287.

policy continues to qualify as life insurance.¹⁰³ Significantly, to qualify as life insurance, there is a threshold maximum limit to the amount of premium that can be paid into a life insurance policy during its early years.¹⁰⁴ Cross this threshold and the policy becomes a Modified Endowment Contract (MEC).¹⁰⁵ As defined by the Internal Revenue Code, there is a "7-pay test" to determine whether a life insurance policy has been converted to an MEC.¹⁰⁶ Simply stated, exceed the threshold limit and what was formerly life insurance with all of its tax-free growth benefits, will unalterably convert into a MEC subject to severe penalties and taxation.¹⁰⁷

While converting a FIUL policy to an MEC should be scrupulously avoided, a key component of the strategy is to accelerate the tax-free growth within the policy.¹⁰⁸ Minimum premiums are not sufficient.¹⁰⁹ To maximize the cash value growth within the policy, the loans used to pay the calculated premiums should be as close as possible to, but not over, the MEC limit.¹¹⁰ Maximum premiums build maximum cash value over time, increasing growth potential within the policy while assuring the likelihood of design success.

V. PREMIUM FINANCING

Premium financing involves

an agreement by which an insured or prospective insured promises to pay to a premium finance company the amount advanced or to be advanced under the agreement to an insurer or to an insurance agent or insurance broker in payment of premiums on an insurance contract together with a service charge.¹¹¹

Stated more simply, "premium financing usually refers to loans to help pay the premiums on life insurance policies."¹¹²

103. RATNER, *supra* note 82, at 10.

104. JANSEN, *supra* note 91, at 276.

105. *Id.*

106. 26 U.S.C.A. § 7702A(b) (2002) ("[A] contract fails to meet the 7-pay test of this subsection if the accumulated amount paid under the contract at any time during the 1st 7 contract years exceeds the sum of the net level premiums which would have been paid on or before such time if the contract provided for paid-up future benefits after the payment of 7 level annual premiums.").

107. 26 U.S.C.A. § 72(e)(10) (2006).

108. JANSEN, *supra* note 91, at 277.

109. *Id.*

110. *Id.* at 276-77.

111. David E. Krischer, "Truth" in Insurance Premium Financing, 30 BUS. LAW., 969, 969 (1974) (quoting GA. CODE ANN. § 84-5303(b)(1970)).

112. JANSEN, *supra* note 91, at 251.

A. History

Premium financing began as a natural outgrowth of the confluence of the “credit revolution” in American society and the insurance industry’s “time honored policy of granting a discount if a term policy premium was paid in advance.”¹¹³ By the 1970s, premium financing was used most notably for “auto, fire, theft, homeowner’s, workman’s compensation, and inland marine” policies.¹¹⁴ Legally mandated auto insurance spurred many drivers to turn to premium financing as a way to stretch out high insurance rates over the entire length of the policy.¹¹⁵ Between 1960 and 1974, twenty-two states legislatively addressed the growth of premium financing.¹¹⁶

Generally, premium financing provides a way to lower the initial cost of obtaining insurance because it spreads the premium burden out over the period of coverage.¹¹⁷ Further, premium financing allows the consumer to build cash assets, with the potential to invest funds to earn more returns, rather than using them as premium payments.¹¹⁸

Legitimate premium financing should be distinguished from certain unscrupulous practices involving particular, but not all, “life settlement” plans.¹¹⁹ Referred to as Stranger Originated or Stranger Owned Life Insurance (STOLI), and also known as Speculator Initiated Life Insurance (SPINLIFE), STOLI has recently attracted the negative attention of insurance regulators, most notably the National Association of Insurance Commissioners (NAIC) and the National Conference of Insurance Legislators (NCOIL).¹²⁰ Originally developed during the early stages of the AIDS epidemic, these plans allowed the sale of life insurance policies to raise immediate cash to pay for medicines not covered by health insurance.¹²¹ This was extended through questionable practices by companies offering the attraction of low to no cost premium financing to induce the medically qualified to purchase life insurance policies with the primary objective of immediately purchasing the policy for its death

113. Frank A. Valenti, *Insurance Premium Financing*, 19 BUFF. L. REV. 656, 656 (1969-1970).

114. *Id.* at 658.

115. *Id.* at 660.

116. Krischer, *supra* note 111, at 970.

117. *Id.* at 969.

118. *Id.*

119. Cory Chmelka, *Premium Financing: The Time is Now*, THE CPA JOURNAL, Sept. 2009, http://findarticles.com/p/articles/mi_qa5346/is_200909/ai_n39231885/.

120. JIM POOLMAN, VIATICAL SETTLEMENTS: A DISCUSSION ON THE NATIONAL CONFERENCE OF INSURANCE LEGISLATORS LIFE SETTLEMENTS MODEL ACT, AND THE ATTEMPTS TO ATTACK THE STRANGER ORIGINATED LIFE INSURANCE MARKET, LEXISNEXIS EXPERT COMMENTARY, 1,1 (July 30, 2008); *see also* POOLMAN, THE NAIC’S VIATICAL SETTLEMENTS MODEL ACT: A DISCUSSION ABOUT THE NAIC’S NEWLY CRAFTED CHANGES TO THE REGULATION OF THE VIATICAL SETTLEMENT BUSINESS, LEXISNEXIS EXPERT COMMENTARY, 1, 1 (July 29, 2008).

121. POOLMAN, *supra* note 120, at 1.

benefit.¹²² There is now widespread discussion among regulators of how to begin "putting STOLI on ice!"¹²³ These types of transactions are far removed from estate and succession planning where premium financing is done on a competitive basis with no ownership interest in the policy by investors or the financing lender.¹²⁴

While the concept of premium financing has been around for decades and used for varying purposes, coupling it with an ILIT as an estate planning strategy is relatively new.¹²⁵

B. Candidate Qualifications

Any candidate who has a potential estate tax need must have sufficient net worth to qualify for the underlying policy. Due to land appreciation, many farmers and ranchers meet the criteria.¹²⁶ However, land, as a major asset, is typically illiquid, and most lenders will require that securities, certificates of deposit, bank letters of credit, or some other form of liquid collateral be posted initially where a "gap" exists between the cash value of the policy and the loan obligation.¹²⁷ The collateral requirement usually diminishes and eventually disappears over time as the cash value builds beyond the money loaned for the premiums.¹²⁸

Programs vary with respect to minimum net worth. For example, some require a minimum net worth of \$2.5 million and a yearly income of \$200,000, while others use a \$5 million net worth threshold.¹²⁹ The general rule of thumb assumes that the estate will continue to appreciate over time at some annual percentage rate.¹³⁰ Thus, the estate of a medically qualified insured today will have an estimated dollar value upon death.¹³¹ For example, if the proposed insured's estate is valued at \$10 million today after applying existing credits, and it is assumed that the estate will appreciate to \$20 million in fifteen years after applying existing credits, and the fifteen year life span of the proposed insured is supported by medical underwriting, then the candidate should qualify for a \$10 million policy today at an assumed tax rate of 50%.

122. *Id.* at 2.

123. *Id.*

124. *Id.*

125. Krischer, *supra* note 111, at 969; *see also supra* Part IV.

126. *See supra* Part II.

127. JANSEN, *supra* note 91, at 287.

128. *See infra* Part V.C.

129. Tuttle, *supra* note 85; *see also* Chmelka, *supra* note 119.

130. *See* Bernhard Grossfeld & Hansjoerg Heppe, *The 2008 Bankruptcy of Literacy—A Legal Analysis of the Subprime Mortgage Fiasco*, 15 L. & BUS. REV. AM. 713, 736 (2009) ("Rule of 72"—72 divided by the annual interest rate provides the number of years it takes for the amount to be actually repaid on a debt to double.').

131. *See id.*

Age is another relevant factor.¹³² Ideally the candidate will be between sixty and seventy years of age, but there is no magic parameter.¹³³ From an actuarial perspective, and based on medical underwriting, there should be sufficient years for the policy cash value to grow in line with historical projections.¹³⁴ Insurance companies depend on their insured's living as long as predicted by mortality tables.¹³⁵

The candidate must qualify as medically insurable.¹³⁶ As with all life insurance policies, the insured must be medically underwritten.¹³⁷ As an insurance term, "medical underwriting" refers to the process of evaluating an applicant's health background and status to decide whether or not to offer insurance coverage and at what cost to the insured.¹³⁸ Generally, all applicants fill out detailed health questionnaires and undergo thorough medical exams.¹³⁹ The information is then used to determine whether to approve or deny the policy application.¹⁴⁰ Minor health issues generally will not affect approval, but may impact the awarded rating category which could then affect the premium cost.¹⁴¹ As to the required premiums, the general rule is the higher the rating the smaller the premiums.¹⁴²

Following medical underwriting and policy approval, candidates must also undergo financial underwriting from the third party lender, and lenders "key off" the life insurance illustrations to formulate loan proposals.¹⁴³

Finally, the candidate must have a bankrupt-remote entity serve as the borrower for the loan.¹⁴⁴ The ILIT fulfills this purpose for estate planning.¹⁴⁵

C. Risks

Assuming that the proposed insured client meets the medical and financial underwriting requirements, premium financing as an estate planning strategy is not wholly risk-free. Significantly, insurance companies illustrate all insurance policies based on historical performance, and premium financing lenders calculate loans based on the insurance

132. KASS, *supra* note 95, at 190.

133. *See id.* at 203.

134. *See id.* at 202-03.

135. *See id.* at 199-200.

136. Tuttle, *supra* note 85.

137. KASS, *supra* note 95, at 190.

138. *Id.* at 211.

139. *Id.* at 211 n.4.

140. *Id.*

141. *Id.* at 190.

142. *Id.*

143. Tuttle, *supra* note 85.

144. *See id.*

145. *See id.*

companies projected performance.¹⁴⁶ Even when using conservative growth figures, it is inherently impossible to predict the future with precise accuracy.¹⁴⁷

Sophisticated proprietary software programs do allow for inputting periods of particular economic upheaval to illustrate how a particular FIUL would perform under the same scenario today.¹⁴⁸ While this is helpful and can assist the decision process, there is always the possibility that unforeseen circumstances could impact future policy performance.¹⁴⁹

Balanced against policy performance risk, however, is the opportunity to make periodic adjustments on annual anniversary dates based on an evaluation of past policy performance to at least partially mitigate some of the future risk.¹⁵⁰ Nonetheless, should the policy fail to perform in later years as illustrated, reduced cash value could require additional premiums at higher interest rates and may require additional collateral from the guarantor.¹⁵¹

Collateral risk is an important component of policy performance risk. Because the primary collateral for the loan is the cash value within the policy after deducting the cost of insurance, there will be a difference between the cash value and the total premium that will require the posting of collateral for the gap, particularly during the early years of the loan.¹⁵² However, depending on performance, the cash value should grow so that the gap closes within a reasonable time and further outside collateral is no longer necessary to satisfy the lender.¹⁵³

Aside from policy performance and collateral risks, there are also interest rate risks. Inherent in a premium financing strategy is the risk that today's low interest rates may grow along with prime and LIBOR rates.¹⁵⁴ Rising rates could forecast additional collateral requirements.¹⁵⁵

146. See Richard M. Weber, *Understanding Life Insurance Illustrations*, TRUSTS & ESTATES, Feb. 1994, at 45, 46-47 (discussing how and why policy illustrations are formulated).

147. *Id.* at 49.

148. See *id.* at 45-46.

149. See *id.* at 49.

150. RATNER, *supra* note 82, at 9.

151. JANSEN, *supra* note 91, at 287.

152. See *id.*

153. See *id.*

154. BLACK'S LAW DICTIONARY 1027 (9th ed. 2009). LIBOR is the abbreviation for London Interbank Offered Rate which is defined as,

A daily compilation by the British Bankers Association of the rates that major international banks charge each other for large-volume, short-term loans of Eurodollars, with monthly maturity rates calculated out to one year. These daily rates are used as the underlying interest rates for derivative contracts in currencies other than the euro. *Id.*

155. JANSEN, *supra* note 91, at 286.

D. Benefits

A strategy that uses life insurance for estate planning is beneficial if it ultimately reduces or eliminates the impact of death taxes on future generations.¹⁵⁶ Premium financing affords additional benefits.¹⁵⁷ When non-liquid assets, such as family agricultural landholdings, represent a significant component of net worth, premium financing can furnish a low-cost vehicle to accomplish this result.¹⁵⁸ Provided there is sufficient asset liquidity to fill the collateral gap during the early policy years, premium financing addresses the “land rich, cash poor” dilemma and the ultimate goal of legacy land preservation.¹⁵⁹

Additionally, the premiums required to capture the full growth benefit to cash value, up to the MEC limit, are substantial regardless of the proposed insured’s age.¹⁶⁰ Absent the financing component, current assets must be used to pay these premiums.¹⁶¹ A properly drafted ILIT will allow a third party to lend the necessary funds to the trust.¹⁶² Even in the unlikely event there is sufficient cash flow to pay the high premium costs, premium financing affords the option of investing those assets elsewhere, with the corresponding potential for additional investment generated earnings.¹⁶³

Because the lender loans the money to the ILIT which in turn pays the premiums to the insurance company, a significant advantage of premium financing is that there will be no gift tax owed as otherwise could result if the insured gifted the premiums to the ILIT.¹⁶⁴ Premium financing can significantly reduce the amount of gift tax exclusion used for purposes of funding the ILIT.¹⁶⁵ An exception could occur if the insured optionally elects to gift the interest on the loan to the ILIT. In this event, the annual exclusions and the unified credit would be reduced to the extent of the gifts.¹⁶⁶

156. See e.g., Janet Morrissey, *How to Avoid the ‘Death Tax’*, June 4, 2009, http://cnn.com/2009/06/03/pf/Death_tax_morrissey.fortune/index/.htm (noting that gifts and trusts can help you pass on more money to your heirs).

157. See discussion *infra* accompanying notes 158-168.

158. See Sebastian v. Grassi, Jr., *Using Life Insurance for Business Succession/Estate Planning for Closely Held Business* (with Sample Provision) 22 No. 2 PRAC. TAX LAW 7, 8 (2008).

159. See CHRISTIAN RAMSEY, *LAND RICH, CASH POOR* 125 (Dog Ear Publishing) (2007). While not discussed in this article, premium financing can also help provide a separate pool of cash reserves that can be used as an estate equalization tool for family members who wish to retain the land intact and those with little or no interest in continuing the enterprise. See Grassi, *supra* note 158, at 8.

160. See *supra* Part IV.A.3.

161. See Tuttle, *supra* note 85.

162. JANSEN, *supra* note 91, at 270.

163. Tuttle, *supra* note 85.

164. See Chmelka, *supra* note 119.

165. JANSEN, *supra* note 91, at 269.

166. *Id.*

In sum, premium financing offers a number of advantages beyond those afforded by simply using an ILIT in the traditional manner.¹⁶⁷ In addition to the benefit of reducing or eliminating estate tax liability, premium financing significantly frees up both cash flow and an insured's annual gift tax exclusion amount to be used more productively.¹⁶⁸

VI. CONCLUSION

Unfortunately, the rallying cry of "save the land from Uncle Sam" is unlikely to cause Congress to resist reinstating the estate tax in 2010 and beyond.¹⁶⁹ It is illogical to assume that the ILIT will soon be relegated to the historical dustbin given today's economic reality.¹⁷⁰ As long as there is a need for life insurance as an estate planning tool, the ILIT will likely continue to grow and prosper.¹⁷¹ Creative estate planners familiar with agricultural landowners will search for new and innovative strategies to preserve the land for future generations, and life insurance will be a prominent cornerstone.¹⁷² To the extent that qualified landowners have the option to finance the substantial premiums, the strategy will continue to be beneficial.¹⁷³ Along with the benefits, however, certain risks are also inherent.¹⁷⁴ Farm and ranching families potentially affected by estate taxes must understand that the options for land preservation are few.¹⁷⁵ Without significant liquid assets within the estate, there is a strong likelihood that all or a substantial portion of the land will be sold to satisfy the government.¹⁷⁶ A pool of ready cash within an ILIT is a practical option; however, the premiums paid out-of-pocket by the insured over the years will be costly and divert cash from other uses.¹⁷⁷ With premium financing there is an additional option whose benefits must be balanced and evaluated against possible risks.¹⁷⁸ While the benefits of premium financing are many, after all of the options are presented, it is the individual landowner who must ultimately weigh the risks and rewards of the financing option and decide whether the rewards tip the scales in favor of this estate planning strategy.

167. See generally *id.* (noting the advantages of premium financing over an ILIT).

168. *Id.* at 269.

169. See *supra* Part III.

170. See generally BUREAU OF INTERNATIONAL INFORMATION PROGRAMS, *supra* note 12 (noting that the people most affected, including those in agriculture, continue to be a large part of the economy).

171. See Seel, *supra* note 4, at 107.

172. See generally *id.* (noting the strategies employed by estate planners).

173. JANSEN, *supra* note 91, at 287.

174. *Id.*

175. See Seel *supra* note 4, at 107.

176. *Id.*

177. *Id.*

178. See Jansen, *supra* note 91, at 287.